ALLOY CONSOLIDATED SDN BHD & ANOR A

v.

ANJARIA PROPERTIES SDN BHD & ANOR AND ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
MOHD GHAZALI YUSOFF JCA
SULONG MATJERAIE JCA
AHMAD MAAROP JCA
[CIVIL APPEAL NOS: W-03-179-2005 & W-03-180-2005] C
10 FEBRUARY 2009

CIVIL PROCEDURE: *Pleadings - Counterclaim - Amendment - Application to amend statement of defence by adding counterclaim - Filing of amendments - Whether statute barred - Whether insertion of counterclaim would turn the suit from one character into a suit of another and inconsistent character - Whether counterclaims based on same facts as pleaded in original statement of defence - Whether appellants would suffer prejudice - Limitation Act 1953, s. 31* D

E

The appellants were involved in the building and construction industry. The first respondent's principal business was building industry and the second respondent was the executive chairman of the first respondent. The first respondent was commissioned by the Jabatan Kerja Raya (JKR) for the building and construction of four government projects ('the said projects'). Due to cash flow problems faced by the first respondent, the second respondent sought the help of one Dato' Dr Nik Hussain, the corporate representative of the first and second appellants, to assist in completing the said projects. An understanding was reached between the second respondent and Dato' Nik Hussain that the second appellant would effectively take over the first respondent's role in the said projects and fronted by the first appellant as it was a bumiputra company. It was also agreed that a sum of RM10,260,399.48 was to be paid to the second appellant for the works it was to undertake. At the outset, the second respondent was dealing with third party contractors who were originally engaged by the first respondent which had sum due and owing to them. The respondents requested the first appellant to advance the sums on the understanding that these sums would be repaid. Consequently, and with the knowledge and consent of the first and second respondents, a sum of RM1,200,000 was advanced by

F

G

H

I

A the first appellant which was used by the second appellant to settle outstanding debts to the said third party contractors. The appellants also claimed from the respondents a sum of RM2,216,404.68 on the said projects. However, in February 1998, the first respondent had appointed contractors to replace the
B second appellant and/or the first appellant. The appellants contended that that constituted repudiation of the agreement between the first respondent and the appellants. The appellants averred that the first respondent was to hold monies received from JKR for the benefit of the second and/or first appellant and to
C that end, the first respondent was at all material times a constructive trustee of the appellants over the said monies. The appellants prayed for an order that the first and the second respondents jointly and severally pay general damages to them. It was averred by the appellants that the first and second
D respondents had conspired to injure the first and/or the second appellant. The first and second respondents denied liability. They denied that the appellants were entitled to any monies or at all payable by the JKR or that the first respondent was a constructive trustee for such monies as alleged because (a) there
E was no enforceable contract whatsoever between the appellants and the first respondent and (b) even if there was a contract the appellants had by their conduct, been in breach of the contract. By encl. 18, the appellants applied for summary judgments against the respondents for the sum of RM336,683.56 which the
F appellants alleged was forwarded to them by the creditors of the first respondent and a further sum of RM2,216,404.68 for the progress claims which the appellants alleged were made to the first respondent for works carried out on the said projects. The High Court entered a summary judgment against the respondents for
G part of the amount prayed for by the appellants. In encls. 38 and 40 respectively, the first respondent and the second respondent applied to amend its statement of defence. Although encl. 38 was at first dismissed, on appeal the first respondent was allowed to amend its statement of defence to include the counterclaim. This
H was the appellants' appeal against this decision ('the first appeal'). The second respondent's encl. 40 application to amend his statement of defence to include a similar counterclaim was also allowed. The appellants also appealed against this said decision ('the second appeal'). The appellants and the respondents agreed
I that both appeals be heard together.

In the first appeal, the appellants submitted that the counterclaim of the first respondent was a new cause of action and that the counterclaim arose out of a cause of action which was statute-barred. The appellants argued that the first respondent's proposed counterclaim failed to fulfil the requirement of O. 20 r. 5(5) Rules of the High Court 1980 as the first respondent did not have a pleaded cause of action against the appellants and that there was an inordinate delay in filing encl. 38 and it was not a bona fide but a contumelious afterthought. It was also argued that the appellants would suffer prejudice that would be irremediable by costs. The first respondent submitted that the counterclaim arose from the same factual matrix based upon which the statement of defence was filed and that it was not statute barred. In the second appeal, in contending that the second respondent's counterclaim was statute barred, the appellants relied on submission similar to that which they made in the first appeal and further contended that in encl. 40 the second respondent had actually made massive restructuring of its statement of defence and added a counterclaim with new causes of action. The second respondent submitted that the second respondent's counterclaim was not a new cause of action and it did not change the character of the suit as it was based on the same facts and arose out of the same transaction as the original statement of defence. Relying on s. 31 of the Limitation Act 1953, it was contended that the counterclaim was not statute barred.

Held (dismissing the appeals)
Per Ahmad Maarop JCA delivering the judgment of the court:

(1) Since the appellants had raised the issue of the counterclaim being barred by the Limitation Act 1953, under s. 31 of the Act, they must prove that the counterclaim was barred when they commenced their action on 25 June 2001. Going by what was pleaded in the statement of claim that the cause of action had arisen at the end of February 1998, the counterclaims of the first respondent and second respondent were not barred by the Act. Since their claims were not barred by the Limitation Act 1953, the respondents did not need to resort to O. 20 r. 5(5) of the RHC. (para 13)

(2) The counterclaim the first respondent sought to add by application in encl. 38 was based on the same facts as pleaded in the original statement of defence of the second respondent. It is settled law that a counterclaim cannot be maintained unless it is shown that the relief claimed is sufficiently connected with or allied to the subject matter of the principle claim as to make it necessary in the interest of justice that it should be dealt with along with the claim. Herein, the first respondent's counterclaim was sufficiently connected with the subject matter of the appellant's claim to make it necessary that it should be dealt with along with the appellants' claim. The amendment sought by the first respondent would not in effect turn the suit from one character into a suit of another and inconsistent character. (para 19)

(3) Delay *per se* does not equal prejudice or injustice. The application in encl. 38 was not made *mala fide*. By allowing the first respondent's application in encl. 38, the appellant would suffer no prejudice or harm that could not be compensated by a suitable order as to costs. If the amendment was not allowed, the first respondent would forever be shut out from its opportunity at receiving justice. Thus, the High Court did not err in allowing the amendment. (paras 20 & 21)

(4) As for the second appeal, the amendment in encl. 40 including the counterclaim was actually based on the same facts as pleaded in the second respondent's original statement of defence. The second respondent's counterclaim was sufficiently connected with the subject matter of the appellants' claim so as to make it necessary that it should be dealt with along with the appellants' claim. The amendment sought by the second respondent in encl. 40 would not in effect turn the suit from one character into a suit of another and inconsistent character. (para 24)

(5) The application in encl. 40 was not made *mala fide*. By allowing encl. 40, the appellants would suffer no prejudice or harm that could not be compensated by a suitable order as to costs. If the amendment was not allowed, the second respondent would forever be shut out from its opportunity at receiving justice. The amendment should be allowed. The High Court did not err in making the order which had the effect of allowing encl. 40. (para 26)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu terlibat dalam industri bangunan dan pembinaan. Perniagaan utama responden pertama adalah industri bangunan dan responden kedua adalah pengerusi eksekutif responden pertama. Responden pertama telah ditugaskan oleh Jabatan Kerja Raya (JKR) untuk bangunan dan pembinaan empat projek kerajaan ('projek-projek tersebut.') Oleh kerana responden pertama menghadapi masalah kewangan, responden kedua menuntut pertolongan dari satu Dato Dr Nik Hussain, wakil korporat perayu pertama dan kedua, dalam membantu menyelesaikan projek-projek tersebut. Satu persefahaman telah dicapai di antara responden kedua dan Dato' Nik Hussain bahawa perayu kedua akan mengambil alih peranan responden pertama di dalam projek-projek tersebut dan dikepalai oleh perayu pertama kerana ia adalah sebuah syarikat bumiputra. Ia juga dipersetujui yang jumlah RM10,260,399.48 dibayar kepada perayu kedua bagi kerja-kerja yang akan ditanganinya. Di permulaannya, responden kedua berurusan dengan kontraktor-kontraktor pihak ketiga yang telah pada asalnya ditugaskan oleh responden pertama yang mempunyai jumlah yang terhutang pada mereka. Responden-responden meminta perayu pertama mendahulukan jumlah tertentu atas persefahaman bahawa jumlah-jumlah tersebut akan dibayar balik. Oleh itu, dan dengan pengetahuan dan kebenaran responden pertama dan kedua, jumlah RM1,200,000 didahulukan oleh perayu pertama yang digunakan oleh perayu kedua untuk menyelesaikan hutang-hutang tertunggak kepada kontraktor-kontraktor pihak ketiga. Perayu-perayu juga menuntut dari responden jumlah RM2,216,404.68 atas projek-projek tersebut. Bagaimanapun, pada Februari 1998, responden pertama telah melantik kontraktor-kontraktor untuk mengganti tempat perayu kedua dan/atau perayu pertama. Perayu-perayu berhujah bahawa kelakuan tersebut telah membatalkan kontrak di antara responden pertama dan perayu-perayu. Perayu-perayu menegaskan bahawa responden pertama sepatutnya memegang wang yang diterima oleh JKR untuk kepentingan perayu kedua dan/atau perayu pertama dan mengikut itu, responden pertama pada setiap masa yang material adalah pemegang amanah konstruktif perayu-perayu ke atas wang-wang tersebut. Perayu-perayu menuntut perintah bahawa responden pertama dan kedua secara berasingan dan bersesama membayar gantirugi am kepada mereka. Perayu-perayu menegaskan bahawa

A responden pertama dan kedua telah berkomplot untuk menjejaskan perayu pertama dan/atau perayu kedua. Responden pertama dan kedua menafikan liabiliti. Mereka menafikan hak perayu-perayu kepada wang-wang tersebut yang dibayar oleh JKR atau bahawa responden pertama adalah pemegang amanah konstruktif bagi
B wang-wang tersebut seperti yang didakwa kerana (a) tidak terdapat kontrak yang boleh berkuatkuasa di antara perayu-perayu dan responden pertama dan (b) jika adapun kontrak perayu-perayu telah dengan tingkah laku mereka, membatalkan kontrak. Melalui lampiran 18, perayu-perayu telah memohon penghakiman terus
C terhadap responden-responden untuk jumlah RM336,683.56 yang perayu-perayu mendakwa telah diberikan kepada mereka oleh pemiutang-pemiutang responden pertama dan seterusnya jumlah RM2,216,404.68 untuk tuntutan-tuntutan pembayaran progress yang dipersetujui perayu-perayu dibuat kepada responden pertama
D untuk kerja-kerja yang telah dilakukan untuk projek-projek tersebut. Mahkamah Tinggi telah memasukkan penghakiman terus terhadap responden-responden untuk sebahagian dari jumlah yang dituntut oleh perayu-perayu. Dalam lampiran 38 dan 40 masing-masing, responden pertama dan responden kedua memohon untuk
E meminda penyataan pembelaan. Walaupun lampiran 38 telah ditolak pada mulanya, semasa rayuan, responden pertama dibenarkan meminda penyataan belaannya untuk memasukkan tuntutan balas. Ini adalah rayuan perayu-perayu terhadap keputusan ('rayuan pertama'). Lampiran 40 responden kedua yang
F memohon untuk meminda penyataan belaannya untuk memasukkan tuntutan balas yang sama juga dibenarkan. Perayu-perayu juga merayu terhadap keputusan tersebut ('rayuan kedua'). Perayu-perayu dan responden-responden bersetuju bahawa kedua-dua rayuan dibicarakan bersama.

G

Di dalam rayuan pertama, perayu-perayu berhujah bahawa tuntutan balas responden pertama adalah kuasa tindakan yang baru dan tuntutan balas tersebut timbul dari kausa tindakan yang dilarang oleh statut. Perayu-perayu berhujah bahawa tuntutan
H balas yang dicadangkan oleh responden pertama gagal memenuhi keperluan A. 20 k. 5(5) Kaedah-Kaedah Mahkamah Tinggi 1980 kerana responden pertama tidak mempunyai kausa tindakan yang diplidkan terhadap perayu-perayu dan terdapat kelewatan dalam pemfailan lampiran 38 dan ia bukan *bona fide* dan adalah satu

I

rekaan. Ia juga dihujahkan bahawa perayu-perayu akan diprejudiskan dan tidak boleh digantirugi dengan kos. Responden pertama pula berhujah bahawa tuntutan balas itu timbul dari pembuktian kes yang sama berdasarkan penyataan pembelaan difailkan dan ia tidak dilarang oleh statut. Di dalam rayuan kedua, dalam hujahan bahawa tuntutan balas responden kedua adalah dilarang oleh statut, perayu-perayu merujuk kepada hujahan yang sama yang dibuat di dalam rayuan pertama dan seterusnya berhujah dalam lampiran 40 responden kedua telah membuat penyusunan semula besar-besaran penyataan pembelaan dan menambahkan tuntutan balas dengan kausa tindakan-kausa tindakan yang baru. Responden kedua berhujah bahawa tuntutan balas responden kedua bukanlah kausa tindakan yang baru dan ia tidak memberi kesan mengubah tindakan kerana ia berdasarkan fakta-fakta yang sama dan timbul dari transaksi yang sama seperti penyataan pembelaan original. Merujuk kepada s. 31 Akta Had Masa 1953, ia dihujahkan bahawa tuntutan balas tidak dilarang oleh statut.

Diputuskan (menolak rayuan-rayuan)
Oleh Ahmad Maarop HMR menyampaikan penghakiman mahkamah:

(1) Oleh kerana perayu-perayu telah membangkitkan isu tuntutan balas dilarang oleh statut di bawah Akta Had Masa 1953, di bawah s. 31 Akta itu, mereka mestilah membuktikan bahawa tuntutan balas dilarang oleh statut apabila mereka memulakan tindakan mereka pada 25 Jun 2001. Melihat kepada apa yang diplidkan di dalam penyataan tuntutan bahawa kausa tindakan telah timbul pada akhir bulan Februari 1998, tuntutan balas responden pertama dan responden kedua tidak dilarang oleh statut di bawah Akta. Oleh kerana tuntutan mereka tidak dilarang di bawah Akta Had Masa 1953, responden-responden tidak perlu rujuk kepada A. 20 k. 5(5) Kaedah-Kaedah Mahkamah Tinggi 1980.

(2) Tuntutan balas yang responden pertama ingin masukkan melalui permohonan lampiran 38 adalah berdasarkan fakta-fakta yang sama yang diplidkan di dalam penyataan belaan yang original responden kedua. Ianya adalah undang-undang termaktub bahawa tuntutan balas tidak boleh dikekalkan

kecuali jika ia jelas bahawa relif yang dituntut adalah secukupnya dikaitkan dengan atau berhubungan dengan hal perkara prinsip tuntutan dan membuatkannya wajib dalam kepentingan keadilan untuk diputuskan bersama-sama dengan tuntutan. Di sini, tuntutan balas responden pertama adalah secukupnya dikaitkan dengan hal perkara tuntutan perayu sehingga ia adalah wajib untuk diputuskan bersama-sama dengan tuntutan perayu. Pindaan yang dituntut oleh responden pertama tidak akan mengubah tindakan kepada satu tindakan yang lain pada sifatnya dan tidak konsisten.

(3) Kelewatan semata-mata tidak bersamaan dengan prejudis atau ketidakadilan. Permohonan lampiran 38 tidak dibuat *mala fide*. Dengan membenarkan permohonan lampiran 38 responden pertama, perayu tidak akan mengalami prejudis atau kerugian yang tidak boleh digantirugi dengan perintah yang sesuai mengenai kos. Jika pindaan tidak dibenarkan, responden pertama akan selama-lamanya tidak dapat peluang memperolehi keadilan. Oleh itu, Mahkamah Tinggi tidak salah apabila membenarkan pindaan.

(4) Mengenai rayuan kedua pula, pindaan di dalam lampiran 40 memasukkan tuntutan balas adalah berdasarkan fakta-fakta yang sama seperti diplidkan di dalam penyataan pembelaan responden kedua yang original. Tuntutan balas responden kedua adalah secukupnya dikaitkan dengan hal perkara tuntutan perayu sehingga ia adalah wajib untuk diputuskan bersama-sama dengan tuntutan perayu-perayu. Pindaan yang dituntut oleh responden kedua di dalam lampiran 40 tidak akan mengubah tindakan kepada satu tindakan yang lain pada sifatnya dan tidak konsisten.

(5) Permohonan di dalam lampiran 40 tidak dibuat *mala fide*. Dengan membenarkan lampiran 40, perayu-perayu tidak akan mengalami prejudis atau kerugian yang tidak boleh digantirugi dengan perintah yang sesuai mengenai kos. Jika pindaan tidak dibenarkan, responden kedua akan selama-lamanya tidak dapat peluang memperolehi keadilan. Pindaan harus dibenarkan. Mahkamah Tinggi tidak salah apabila membuat perintah membenarkan lampiran 40.

Case(s) referred to:

Abdul Johari Abdul Rahman v. Lim How Chong & Ors [1997] 1 CLJ 361 CA ***(refd)***

Esso Standard Malaya Bhd v. Southern Cross Airways (Malaysia) Bhd [1972] 1 LNS 31 HC ***(refd)***

Hock Hua Bank Bhd v. Leong Yew Chin [1987] 1 CLJ 126; [1987] CLJ (Rep) 126 SC ***(refd)***

HSBC Bank Malaysia Bhd v. Macquarie Technologies (Malaysia) Sdn Bhd & Another Appeal [2004] 3 CLJ 121 CA ***(refd)***

Wright Norma v. Overseas-Chinese Banking Corporation Ltd [1994] 1 SLR 513 ***(refd)***

Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(refd)***

Legislation referred to:

Limitation Act 1953, ss. 30(1), 31

Rules of High Court 1980, O. 15 r. 2(1), O. 20 rr. 5(1), (5)

Limitation Act 1939 [UK], s. 28

Other source(s) referred to:

19 Halsbury's Statutes, 3rd edn, p 89

For the appellant - Arthur Wang Ming Way (Aishah Fadin Baharudin & Neoh Hor Kee with him); M/s Arthur Wang Lian & Assocs

For the 1st respondent - S S Ravichandran (Ng Chung Yee with him); M/s Seah Balan Ravi & Co

For the 2nd respondent - James Selva (Normaezah Ismail with him); M/s Ong Kok Bin & Co

[Appeal from High Court, Kuala Lumpur; Suit No: S1-22-538-2001]

Reported by Suhainah Wahiduddin

JUDGMENT

Ahmad Maarop JCA:

[1] This judgment concerns two related appeals - Rayuan Sivil No. W-03-179-2005 (the first appeal) and Rayuan Sivil No. W-03-180-2005 (the second appeal). Both appeals arose out of the suit filed by the plaintiffs (the appellants before us in both appeals) in the Civil Suit No. S1-22-538-2001, against the first and the second defendant (the first and the second respondent respectively before us).

[2] The case pleaded by the appellants against the respondents in substance is as follows. Both the appellants were at all material times involved in the building and construction industry. The principal business of the first respondent at all material times was building industry. The second respondent was at all material times the Executive Chairman of the first respondent. Between the period from or on about 18 April 1995 to 7 May 1996, the first respondent was commissioned by the Jabatan Kerja Raya (JKR) for the building and construction of four government projects (the said projects). Because the first respondent was facing cash flow problems, the second respondent sought the help of one Dato' Dr. Nik Hussain Abdul Rahman (Dato' Nik Hussain) to assist in completing the said projects. Dato' Nik Hussain was the corporate representative of the first and the second appellants. As a result of a series of meetings between the second respondent and Dato' Nik Hussain, an understanding was reached that the second appellant would effectively take over the first respondent's role in the said projects. The takeover would be fronted by the first appellant as it was a bumiputra company. It was also agreed that to all intents and purposes, the first respondent would publicly remain as the contractor appointed for the said projects. It was also agreed that a sum of RM10,260,399.48 was to be paid to the second appellant for the works it was to undertake. The second appellant commenced works. At the outset, the second respondent was compelled by circumstance to deal with third party contractors who were originally engaged by the first respondent which had sum due and owing to them. The second appellant requested funds from the first respondent to settle the debts. However, the first respondent, through the second respondent, requested the first appellant to advance the sums on the understanding that these sums would be repaid. Consequently, and with the knowledge and consent of the first and the second respondents, a sum of RM1,200,000 was advanced by the first appellant. The second appellant used the sum to settle outstanding debts to the said third party contractors. The appellants also claimed from the respondents a sum of RM2,216,404.68, which the appellants said was expended by them on the said projects. Claim for this sum was made by the appellants to the first respondent from time to time. The appellants alleged that sometime in February 1998, the first respondent appointed contractors to replace the second appellant and/or the

first appellant. The appellants contended that that constituted repudiation of the agreement between the first respondent and the appellants. By their solicitors' letter dated 30 April 2001, the appellants accepted the repudiation and termination of the said agreement. Further, or in the alternative, the appellants averred that the first respondent was to hold monies received from JKR for the benefit of the second and/or the first appellant and to that end, the first respondent was all material times, a constructive trustee of the appellants over the said monies. The appellants prayed for an order that the first and the second respondents jointly and severally pay general damages to them. Alternatively, the appellants prayed for an order that the first and the second respondents jointly and severally, pay the sum of RM2,216,404.68 to the second appellant, and the sum of RM1,200,000 to the first appellant.

[3] As against the second respondent, the appellants averred that the second respondent had deceived them by stating that funds for the said projects coming from JKR would be paid to them, although he knew at all times that the first respondent would not be paying either of them. In the alternative, the appellants averred that the board of the first respondent at all times acted in concert with the second respondent and as such the first respondent had been a participant in the deception carried out by the second respondent as a joint tortfeasor. Further, or in the alternative, it was averred that the first and the second respondents had conspired to injure the first and/or the second appellant.

[4] The first and second respondents file separate statements of the defence, in which they denied liability. Essentially they denied that the appellants were entitled to any monies or at all payable by the JKR or that the first respondent was a constructive trustee for such monies as alleged because:

(a) there was no enforceable contract whatsoever between the appellants and the first respondent; and

(b) even if there was a contract the appellants had by their conduct, been in breach of the contract.

[5] In the summon-in-chambers dated 6 November 2002, (encl. 18), the appellants applied for summary judgments against the respondents for the following sums:

(a) the sum of RM336,683.56 which the appellants alleged was forwarded by them to the creditors of the first respondent who were involved in the said project, and

(b) the sum of RM2,216,404.68 for the progress claims which the appellants alleged were made to the first respondent for works carried out on the said projects.

[6] On 10 May 2004, the Senior Assistant Registrar (SAR) of the High Court entered a summary judgment against the respondents for part of the amount prayed for by the appellants in encl. 18. In the summon-in-chambers dated 30 June 2004, (encl. 38), the first respondent applied to amend its statement of defence dated 4 September 2001. In the summon-in-chambers dated 9 July 2004 (encl. 40) the second respondent applied to amend his statement of defence. On 27 August 2004, the learned SAR allowed the application in encl. 40. The appellants appealed to the learned judge (encl. 47). On 10 January 2005 the learned SAR dismissed the application in encl. 38 with costs. The first respondent appealed to the learned judge (encl. 52). The learned judge heard the appeals in encl. 47 and 52 together. On 26 October 2005, the learned judge allowed the first respondent's appeal in encl. 52 and hence the first appeal. On the same date, the learned judge dismissed the appellants' appeal in encl. 47 and hence the second appeal. At the outset of the hearing before us, the appellants and the respondents agreed that both appeals be heard together, beginning with the second appeal.

The Submissions

The First Appeal

[7] The thrust of the submission of the learned counsel for the appellant was that the counterclaim of the first respondent was a new cause of action and that the counterclaim arose out of a cause of action which was statute - barred. He submitted that in its statement of defence, the first respondent pleaded that there was no privity of contract between it and the appellants. However, in the counterclaim the first respondent averred in the alternative that even if there was a contract between them, there was a breach of it. In this regard he argued that the breach occurred when the appellants stopped work and the first respondent put in their own workers. Elaborating on the counterclaim which he contended to be statute barred, learned counsel said neither the first respondent's statement of defence

nor its counterclaim specified when the alleged breach by the appellant took place. However, he said, para. 15 of the appellant's statement of claim averred that the first respondent had placed its workers at the construction sites at or about February 1998, hence amounting to repudiation of the contract. Since, this was not expressly denied by the first respondent in either its statement of defence or its counterclaim, it was taken to be admitted. He contended that it was clear therefore, that cause of action on which the proposed counterclaim was made had accrued at the end of February 1998 at the latest. That, he argued, was when all material facts occurred which entitled the first respondent to sue for the remedy sought. Thus, it was submitted in his written submission that:

> according to Section 6(1)(a), Limitation Act, 1953, the limitation period for the Proposed Counterclaim would be 6 years as it is based on contract. As such, the limitation period would set in latest when the appellants purportedly breached the contract by abandoning the Projects (which is denied) i.e. by the end of February, 2004. The Proposed Counterclaim was therefore time-barred at the time encl. 38 was filed.
>
> The learned judge erroneously allowed the amendment inserting the time-barred Proposed Counterclaim.
>
> The Appellants submit that as the Proposed Counterclaim was time-barred, the only way that it could be allowed is if the 1st Respondent fulfilled both the requirements of Order 20 Rule 5(5), RHC:
>
> (a) that the new cause of action must arise from the same facts or substantially the same facts as an existing cause of action; and
>
> (b) that the party seeking for leave to amend (ie, the 1st Respondent) must have already pleaded an existing cause of action and sought relief from such cause of action.
>
> In the present case, the Appellants submit that the 1st Respondent's Proposed Counterclaim fails to fulfil the second requirement of Order 20 Rule 5(5) as the 1st Respondent did not have a pleaded cause of action against the Appellants prior to its application in Enc. 38. No counterclaim was pleaded against the appellants in the 1st Respondent's Statement of Defence, a fact expressly acknowledged by the learned judge [Record of Appeal, pg. 22].

A Therefore, there existed no basis for the amendment inserting the Proposed Counterclaim that was clearly time-barred by the time the 1st Respondent filed encl. 38. The learned judge failed to appreciate this fact, preferring to merely state that the Proposed Counterclaim was in accordance with the principles laid down in
B *Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn. Bhd.* [1983] 1 MLJ 213. His Lordship did not refer to the applicable legal provisions in the RHC and/or the LA 1953.

In this regard it was contended that s. 31 of the Limitation Act 1953 had no impact upon the provision under O. 20 r. 5(5) of
C the Rules of High Court 1980 (RHC).

[8] The other point raised on behalf of the appellant was that these was an ordinate delay in filing encl. 38 and it was not *bona fide* but was a contumelious afterthought. The counterclaim was
D filed as a tactical manoeuvre to deprive the appellants of the fruits of their successful application for summary judgment. It was also argued that the appellants would suffer prejudice that would be irremediable by costs.

E **[9]** In reply, the learned counsel for the first respondent submitted that the counterclaim arose from the same factual matrix based upon which the statement of defence was filed. It concerned the said projects which were abandoned by the appellants, and which the first respondent had to take over and
F employ new sub-contractors resulting in increased costs being incurred by them. It was also contended that the counterclaim was not statue barred. In this regard, learned counsel for the first respondent submitted that the appellants were relying on the assumption that the counterclaim was statute barred when in fact there was a dispute as to the date when the first respondent took
G over the said projects.

The Second Appeal

[10] Essentially, in this appeal, in contending that the second
H respondent's counterclaim was statute-barred, the appellants relied on submission similar to that which they made in the first appeal. It was also contended by the learned counsel for the appellants that in encl. 40 the second respondent actually made massive restructuring of its statement of defence and added a counterclaim
I with new causes of action. Learned counsel submitted that "the massive amendments from top to bottom of the defence radically

change the nature of the 2nd respondent's statement of defence, purportedly to provide a foundation for its proposed counterclaim. This in turn effectively changed the 2nd respondent defence into another of inconsistent character. In fact, from the extensive amendments made, the amended/defence was a completely new defence! Such amendments should not be permitted."

[11] In reply, the substance of the submission made by learned counsel for second respondent was that the second's respondent's counterclaim was not a new cause of action and it did not change the character of the suit as it was based on the same facts and arose out of the same transaction as the original statement of defence. Relying on s. 31 of the Limitation Act 1953, it was contended that the counterclaim was not statute barred. Learned counsel also submitted that O. 20 r. 5(5) of RHC was not relevant to the proceeding before the court.

Decision

[12] It appears to us that the real complaint of the appellants in both the appeals is the addition of the respective counterclaims which the appellants contended were statute barred and that s. 31 of the Limitation Act 1953 had no application to the amendment sought by the respondents. For reasons which we will explain shortly, we cannot accept the submission made on behalf of the appellants. Under O. 15 r. 2(1) of RHC, a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter and where he does so he must add the counterclaim to his defence. So he has a choice. He can bring a separate action or make a counterclaim. If he makes a counterclaim how do we determine whether it is statute-barred? We feel that this is where the Limitation Act 1953 comes into play. We do not agree that s. 31 of the Limitation Act 1953 do not apply to this proceeding. Section 30(1) of the Act provides:

> This Act and any other written law relating to the limitation of actions shall apply to arbitrations as they apply to actions.

So, s. 31 of the Limitation Act 1953 is relevant and reference must be made to it. That provision is similar to s. 28 of the English Limitation Act 1939. The annotation to this section in *19 Halsbury's Statutes* (Third edn) at p. 89 is as follows:

> The effect of this section is that, if this Act is pleaded to a defence of set-off or a counterclaim, the plaintiff, in order to establish his plea, must prove that the set-off or counterclaim was barred when he himself commenced his action and it is not enough to prove that it was barred at the time when it was pleaded.

[13] Since the appellants had raised the issue of the counterclaim being barred by the Limitation Act 1953, under s. 31 of the Act, they must prove that the counterclaim was barred when they commenced their action (25 June 2001). Going by what was pleaded in the statement of claim that the cause of action had arisen at the end of February 1998, the counterclaim of the first respondent was not barred by the Act. Similarly, as will be clear later in this judgment, the cause of action relevant to the second respondent's counterclaim also had arisen at the end of February 1998. Thus, his counterclaim was also not barred by the Act. Since their counterclaims were not barred by the Limitation Act 1953, the respondent do not need to resort to O. 20 r. 5(5) of RHC. In our view, in the circumstances of the present appeals, in order to persuade the court to exercise its discretion under O. 20 r. 5(1) of RHC, the respondents need only satisfy the court the following, namely; (1) that their applications are *bona fide*; (2) the prejudice caused to the appellants can be compensated by costs; and (3) the amendments in encl. 38 and encl. 40 respectively, would not in effect turn the suit from one character into a suit of another inconsistent character. (See *Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428, FC). Yamaha Motor as well as other familiar decisions on the subject of amendment of pleadings under O. 20, RHC were referred to by this court in *Abdul Johari Abdul Rahman v. Lim Hou Chong & Ors* [1997] 1 CLJ 361. In delivering the judgment of the court, Abdul Malek Ahmad JCA (as he then was) said:

> The authorities strongly indicate that the courts should lean towards granting application for amendments even when a new cause of action or line of defence is raised, provided it is based on the same facts or arose out of the same transaction subject, however, to an award of costs to the other party for the injustice caused by the amendments. On these considerations, we agree with the learned judge that as far as the amendments were concerned, there is no basic departure from the original pleadings which were grounded on the principles of equity.

[14] We now turn to consider the amendments applied for in encl. 38 and encl. 40. A

Enclosure 38

[15] Earlier in this judgment, we have set out in substance the case pleaded by the appellants. Three basic facts form the thrust of the appellants' cause of action. The first is the commissioning of the first respondent by the JKR to carry out the said projects. The second is the meetings between the second respondent and Dato' Nik Hussain. The third is that at the material times, the first respondent was facing cash flow problem. To reiterate, the appellants averred that arising from the series of meeting between the second respondent (the executive chairman of the first respondent), and Dato' Nik Hussain, agreement was reached, whereby the second appellant would affectively take over the first respondent's role in the said projects, the take over would be fronted by the first appellant as it was a bumiputera company, the first respondent would, for all intents and purposes, remain publicly as the contractor appointed for the said projects, and that the appellants would be repaid out of the proceed received from the JKR. We observe that in its pleaded case, unlike the first respondent, the appellants did not make any specific reference to the role played by MTD Capital Bhd (MTD). This brings us to the first respondent's case as pleaded in its original statement of defence. The three basic facts forming the thrust of the appellants' case, were not disputed by the first respondent. In their original statement of defence, the first respondent admitted that there were several meetings between the second respondent and Dato' Nik Hussain, the then Executive Chairman of MTD, who was also the second respondent's friend, but denied that arising from the said meeting, agreement was reached between the appellants and the first respondent. The first respondent contended their dealing and agreement was with MTD and that the appellants were sub-contractors or agents of MTD. In this regard, the first respondent explained that the purpose of the meetings was to get Dato' Nik Hussain/MTD to assist the first respondent which was then cash strapped and unable to complete three of the said projects. According to the first respondent, in the discussion between them, although, the first respondent (through the second respondent) sought Dato' Nik Hussain's assistance as B C D E F G H I

A Executive Chairman of MTD, to fund the first respondent to complete the said projects, option was also extended to Dato' Nik Hussain that if MTD desired, it could acquire the entire share capital of the first respondent. Dato' Nik Hussain expressed great interest and would explore the possibility of an acquisition by
B MTD. Dato' Nik Hussain also agreed to render immediate help to the first respondent to complete the ongoing projects. In the meetings it was also decided that sub-contractors would be appointed by Dato' Nik Hussain to assist in completing the projects and ultimately MTD would be responsible to the sub-
C contractors in the light of the proposal to acquire the equity of the first respondent.

[16] The first respondent averred that later, the second appellant requested the first respondent to hand over the contract
D documents of the uncompleted projects, which was duly acceded to by the first respondent. The second appellant was a sub-contractor appointed by MTD to assist the first respondent to complete the projects. Later still, in late September 1997, several persons purporting to be representatives of the second
E appellant moved into various project sites and directed all existing sub-contractors to immediately stop the works which were in progress. The first respondent's employees and its several sub-contractors on the sites were informed that new sub-contractors would take over shortly.

F **[17]** Although the discussion with Dato' Dr Nik was to seek the assistance of MTD to fund the first respondent's ongoing projects, monies were due to the suppliers and sub-contractors who were already working on the sites. Their services were terminated by the
G MTD's agent who arrived at the sites and this made it imperative that all payments due to the said suppliers and sub-contractors be made promptly. An estimate of this payments was sent to MTD. MTD notified the second respondent that another subsidiary of MTD would be advancing the payments and for the first time
H reference was made to the first appellant. On MTD's directions, a list of the first respondent's immediate requirements were forwarded to the first appellant. The first respondent denied any knowledge of the advance of RM1,200,000 from the first appellant to the second appellant and that that sum was used by the
I second appellant to settle outstanding debts to the contractors. The first respondent admitted that works commenced at the site,

but averred that the first appellant was not informed whether it was a sub-contractor or worker employed by the second appellant as agents of MTD. The first appellant was also not informed as to who would be responsible for their payment. A

[18] On 12 December 1997 the first respondent received progress claims from the second appellant which the first respondent contended did not commensurate with the work carried out by the workers who had come on the sites, and that much of the work included in the claims had been completed by the previous sub-contractors, and the second appellant had improperly included these items of work as having been undertaken and completed by them. In January 1998, the second appellant again made further progress claims which the first respondent objected. Thereafter, it became apparent that the second appellant was no longer interested in carrying on with the work. The second appellant indicated that unless progress payments were made, it would be compelled to stop work completely. The second respondent approached MTD to resolve the matter. Nevertheless, all work thereafter completely ceased. The first respondent averred that upon sudden cessation of work at the site, it was compelled to obtain assistance of another sub-contractor to complete the contracts which was by then mostly overdue. Owing to sudden cessation of the work by MTD's agents, the JKR terminated the contract on the Sekolah Rendah Pendidikan Khas which was one of the said projects. The first respondent then concluded its defence denying that the appellants were entitled to any monies or at all payable by the JKR or that the first respondent was constructive trustee for such monies as alleged because: B C D E F

(a) there was no enforceable contract whatsoever between the appellants and the first respondent, and G

(b) even if there was a contract, the appellants had been in breach of the contract and had, by such breach forfeited all right to any claim for these monies or at all. H

[19] So, the alternative plea that there was no contract and if there was one, the appellants had breached it, was already part of the first respondent's original statement of defence. In its counterclaim, the first respondent repeated what he had alleged in the original statement of defence. Then, relying and following through on the plea that even if there was a contract between it I

and the appellants, the appellants were in breach of that contract, in the counterclaim, the first respondent averred that that the breach of contract by the appellants (by suddenly abandoning the contract works), had caused it to suffer costs and damages in that it had to pay liquidated damages and other expenses on account of the delay caused by the breach, as well as cost overruns relating to the said projects. So, clearly, the counterclaim added by application in encl. 38 was based on the same facts as pleaded in the original statement of defence of the first respondent. In this connection, reference must be made again to O. 15 r. 2(1) of RHC which allows a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and howsoever arising), instead of bringing a separate action, to make a counterclaim in respect of that matter and where he does so he must add the counterclaim to his defence. However, it is settled law that a counterclaim cannot be maintained unless it is shown that the relief claimed is sufficiently connected with or allied to the subject matter of the principle claim as to make it necessary in the interest of justice that it should be dealt with along with the claim. Thus a counterclaim for slander cannot be maintained in a claim for money lent (See *Esso Standard Malaya Bhd v. Southern Cross Airways (Malaysia) Bhd* [1972] 1 LNS 31; [1972] 1 MLJ 168, at 170, per Raja Azlan Shah J as His Royal Highness then was). In the present appeal from what we have demonstrated thus far, the first respondent's counterclaim is sufficiently connected with the subject matter of the appellants' claim to make it necessary that it should be dealt with along with the appellants' claim. We are satisfied that the amendment sought by the first respondent in encl. 38 would not in effect turn the suit from one character into a suit of another and inconsistent character.

[20] On the issue of delay, it was submitted by the learned counsel for the appellants that there was no explanation for the delay of nearly three years in the filing of encl. 38 which was done after the SAR had entered summary judgment for the appellants, though for only part of its claim. Thus, it was contended on behalf of the appellants that the application in encl. 38 was not *bona fide* but represented a contumelious afterthought and was filed as a tactical maneuver to deprive the appellants of the fruits of their successful application for summary judgment. We do not think so. While the time at which an amendment is made is a

relevant consideration it is not necessarily decisive. Delay *per se* does not equal prejudice or injustice. (See *HSBC Bank Malaysia Bhd v. Macquarie Technologies (Malaysia) Sdn Bhd & Another Appeal* [2004] 3 CLJ 121, *Wright Norma v. Overseas-Chinese Banking Corporation Ltd* [1994] 1 SLR 513). In its affidavit in reply, the first respondent explained that the SAR entered the summary judgment only for the sum of RM427,420.10 and that the SAR held that the respondent had successfully raised triable issues which should be tried in respect of the rest of the appellants' claim. Therefore the amendment in encl. 38 was applied for to reflect the true case of the first respondent's against the appellant.

[21] We are not convinced that the application in encl. 38 was made *mala fide*. In the present appeal we are satisfied that by allowing the first respondent's application in encl. 38, the appellant will suffer no prejudice or harm that cannot be compensated by a suitable order as to costs. On the other hand, we have to consider the position of the first respondent. Its counterclaim may or may not succeed. In this proceeding we are not concerned with the merit of the first respondent's case. However, if the amendment is not allowed, the first respondent will forever be shut out from its opportunity at receiving justice. On balance, we feel that the amendment should be allowed. We therefore hold that the learned judge of the High Court did not err in making the order which had the effect of allowing encl. 38.

[22] In the result the appeal is dismissed with costs.

Enclosure 40

[23] In his original statement of defence, the second respondent pleaded facts and defence which were similar to that pleaded in the first respondent's statement of defence. Just as in the case of the first respondent, the three basic facts which form the thrust of the appellants' case were not disputed by the second respondent. So, what we have said in paras. 15, 16, 17 and 18 of this judgment also apply *mutatis mutandi* to the second appellant. Like the first respondent, the second respondent averred that upon sudden cessation of work at the sites, the first respondent was compelled to obtain assistance of another sub-contractor to complete the contracts which was by then mostly overdue. Owing to sudden cessation of the work by MTD's agents, the JKR terminated the contract on the Sekolah Rendah Pendidikan Khas

which was one of the said projects. The second respondent then concluded its defence denying that the appellants were entitled to any monies or at all payable by the JKR or that the first respondent was constructive trustee for such monies as alleged because:

(a) there was no enforceable contract whatsoever between the appellants and the first respondent, and

(b) even if there was a contract, the appellants had been in breach of the contract.

[24] Like the first appellant, the alternative plea that there was no contract and that if there was one, the appellants had breached it, was already part of the second respondent's original statement of defence. Relying and following through on the plea that even if there was a contract between the first respondent and the appellants, the first appellants were in breach of that contract, in his counterclaim, the second respondent averred that the breach of contract by the appellants had caused him to suffer loss and damages in the form of loss of investment in the first respondent amounting to RM2,400,000, and loss of allowance of RM4,000 a month from January 2003 to October 2013. How the said loss and damages came about were set out in the amendment applied for in encl. 40, particularly paras. 13G to 13K of the amended statement of defence. It is clear to us that the amendment in encl. 40 including the counterclaim was actually based on the same facts as pleaded in the second respondent's original statement of defence. It is also clear to us that the second respondent's counterclaim is sufficiently connected with the subject matter of the appellants' claim so as to make it necessary that it should be dealt with along with the appellants' claim. We conclude that the amendment sought by the second respondent in encl. 40 would not in effect turn the suit from one character into a suit of another and inconsistent character.

[25] On the issue of delay, learned counsel for the appellant submitted similar point which he raised in respect of the first appeal. He contended that the second respondent was aware of the facts which would allow him to counterclaim against the appellant from the day it received the statement of claim, but he chose to wait until the very last moment to apply for amendment. This, he submitted coupled with the lack of explanation for the

delay showed that encl. 40 was a contumelious afterthought and was not made *bone fide*. We do not agree. In his affidavit in reply to the appellants' affidavit in opposing encl. 40, the second respondent's explanation's for the delay was that his former solicitors did not advise him as to the counterclaim he could make against the appellants. In this regard, in *Hock How Bank Bhd v. Leong Yew Chin* [1987] 1 CLJ 126; [1987] CLJ (Rep) 126, the Supreme Court said:

> As for the general principles for the granting of leave to amend:
>
> > It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made 'for the purpose of determining real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings' (see per Jenkins LJ in *GL Bakar Ltd. v. Medway Building & Supplies Ltd.* [1958] 1 WLR 1216, p. 1231; [1958] 3 All Er 540, p. 546).
>
> It is a well established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace ... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right' (per Bowen LJ in *Cropper v. Smith* [1883] 26 Ch D 700, pp. 710-722, with which observations A Smith LJ expressed 'emphatic agreement' in *Shoe Machinery Co v. Cultam* [1896] 1 Ch 108, p. 112).

[26] Like what we said in respect of encl. 38, we are not convinced that the application in encl. 40 was made *mala fide*. In the present appeal we are satisfied that by allowing the first respondent's application in encl. 40, the appellant will suffer no prejudice or harm that cannot be compensated by a suitable order as to costs. On the other hand, we have to consider the position

of the second respondent. His counterclaim may or may not succeed. In this proceeding we are not concerned with the merit of the second respondent's case. However, if the amendment is not allowed, the second respondent will forever be shut out from its opportunity at receiving justice. On balance, we feel that the amendment should be allowed. We therefore hold that the learned judge of the High Court did not err in making the order which had the effect of allowing encl. 40.

[27] In the result the second appeal is dismissed with costs.